**IN THE COURT OF APPEALS OF THE STATE OF IDAHO**

**Docket No. 35622**

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| **STATE OF IDAHO,** | ) | **2009 Unpublished Opinion No. 601** |
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| **Plaintiff-Respondent,** | ) | **Filed: September 9, 2009** |
| | ) | |
| **v.** | ) | **Stephen W. Kenyon, Clerk** |
| | ) | |
| **ERIK TUITE,** | ) | **THIS IS AN UNPUBLISHED** |
| | ) | **OPINION AND SHALL NOT** |
| **Defendant-Appellant.** | ) | **BE CITED AS AUTHORITY** |
| | ) | |

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

Order denying Idaho Criminal Rule 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

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Before LANSING, Chief Judge, PERRY, Judge
and GUTIERREZ, Judge

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PER CURIAM

Erik Tuite was charged with three counts of rape for engaging in sexual intercourse with a thirteen-year-old and two fourteen-year-old girls. Pursuant to a plea agreement, Tuite pled guilty to two amended counts of injury to a child, Idaho Code § 18-1501(1) and the remaining count was dismissed. The district court imposed concurrent unified sentences of ten years with five years determinate, suspended the sentences, and placed Tuite on probation. Following several reports of probation violations, the district court revoked probation, ordered execution of the underlying sentences and retained jurisdiction. Upon Tuite's completion of retained jurisdiction, the district court relinquished jurisdiction and executed the original sentences. Tuite filed an Idaho Criminal Rule 35 motion seeking reconsideration of the relinquishment of

jurisdiction or reduction of his sentence. The district court denied the motion. Tuite appeals from the denial of his Rule 35 motion.

Tuite argues that the district court's denial of his Rule 35 motion was an abuse of discretion because the court relied on two clearly erroneous findings. He contends that the district court incorrectly found that Tuite had previously admitted to violating his probation by committing a battery on his girlfriend and that the court made a diagnosis that Tuite suffers from anti-social personality disorder, without support in the record for this determination. We conclude that Tuite is not entitled to relief on appeal even if the district court made erroneous findings as alleged by Tuite because we deem it very clear from the record that, even in the absence of the alleged errors, the trial court's decision on Tuite's Rule 35 motion would have been the same.

The decision whether to grant a Rule 35 motion for leniency is committed to the discretion of the sentencing court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). When a discretionary ruling has been tainted by legal or factual error, we ordinarily vacate the decision and remand the matter to the trial court for a new, error-free discretionary determination. *State v. Medrain*, 143 Idaho 329, 333, 144 P.3d 34, 38 (Ct. App. 2006); *State v. Upton*, 127 Idaho 274, 276, 899 P.2d 984, 986 (Ct. App. 1995). A remand may be avoided, however, if it is apparent from the trial court's own expressed reasoning that the result would not change or that a different result would represent an abuse of discretion. *Id.*; *McDonald v. State*, 124 Idaho 103, 107, 856 P.2d 893, 897 (Ct. App. 1992). Therefore, if we are convinced beyond a reasonable doubt that the district court would have denied Tuite's Rule 35 motion based solely on other information before the court, appellate relief will not be granted.

Here, Tuite made a statement at the Rule 35 hearing in which he denied that he had ever committed any probation violations other than going to a dance club and said that he did not consider himself to be a criminal. The district court thereafter explained at great length its decision to deny the motion. The general flavor of the court's multiple concerns about Tuite can be discerned from the following excerpts:

> I . . . note that the original evaluation from May of '03 noted that you presented as a victim at that time and showed narcissistic qualities. To quote Mr. Nielson: Erik's profile suggests a person with a great need for control and dominance and a pronounced sense of self-importance, end of quote.

. . . .

The second [probation] violation was filed August 8th, '06, for curfew violations and for having sexual relations not allowed by your probation terms.

And then a third violation that led to you being before me was filed November 15, '07, after you had been discharged from Mr. Ater's treatment. You had further sexual contact, violating your sex offender treatment contract and continued curfew violations.

So at that juncture, and again even today, you maintain that I inappropriately or incorrectly violated you or put you in the rider when you were innocent of any probation violations; and that's your right to feel as you do, but I take objective notice of Mr. Ater's report wherein he noted that you failed a polygraph as to your sexual partners and consumption of alcohol. He noted you showed a lack of candor in treatment, showed ongoing and contentious behavior in group, including, quote, adolescent confrontations with therapists, causing you to be a disruptive influence on many occasions, end of quote. That's from Mr. Ater's letter from December 11, 2007. Mr. Ater further stated, and I quote again: Erik has struggled throughout his therapy with accepting responsibility for his behavior as well as his crimes.

. . . .

In receiving the jurisdictional review report, I would conclude that nothing has changed. You continue to take a victim's stance, again by noting it was a mistake for the court to send you there, as you have done nothing wrong, I didn't care about the facts; but as set forth above, the facts in your file are replete with reasons why you're not a candidate for probation. You just are not a candidate. You don't want to be supervised, and that's your choice; but you are not a candidate for probation.

You continue to minimize your actions vis-à-vis your crimes. Mr. Hatch argued today that these weren't unknown victims to you. And yet, in the presentence report, page three, your own statement and I quote from you, was: I am unsure of what actually happened, because I don't know the alleged victims. And as I understand, I had sexual contact with the victims sometime, somewhere in 1999. I need to be told and shown who, what, when, where these terrible crimes supposedly occurred. Please, talk to me about this, please, for I am unsure.

That was at the time this crime was committed and when you were sentenced. So to come in today and tell me you knew these ladies, or these your women, these teenagers, that they weren't unknown to you is again a conflict in the evidence.

. . . .

Even with your attempts at five years' worth of treatment in the community and a few months now in the sex offender program at North Idaho, nothing has changed that same attitude. You're here today saying you are not a criminal, you have done nothing wrong. Unfortunately, having sex with 13 to 14 year old girls is a crime; and apparently, five and a half years' worth of treatment, probation, sex offender directed treatment, has done nothing to change that, as

> you directly and candidly admit you're not a criminal in your own mind and, for that reason, likely, part of which you're back before me today.
>
> You continue and, I conclude throughout all of the record, avoid taking responsibility for your behaviors. . . . And Mr. Lutz concluded at the last page of his report, if released, Mr. Tuite would probably not benefit from participation in sex offender treatment groups while out in the community. He does not appear to be amenable to sex offender treatment at this time. He has been in treatment for a number of years and has participated in the assessment program at NICI, however, continues to struggle with personal responsibility.
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> Mr. Lutz also said, notwithstanding your moderate risk for sexual reoffending, quote: Despite his apparent moderate risk for sexually reoffending, he appears to be a high risk to continue to violate the laws and/or the rules of probation. Mr. Tuite displays an attitude of superiority and entitlement that would suggest he considers himself to be above the laws and the rules of probation, end of quote.
>
> Again, you continue to minimize, blame others, and take the victim stance; and based upon these factors alone, apart from anything that happened behaviorally in the retained jurisdiction program, relinquishment would be appropriate.
>
> . . . .
>
> The request to reduce your sentence is denied. I feel that leniency is not warranted in your case, given your history on probation and the nature of these original offenses, which were sex crimes against minor females.

Based on these comments, this Court is thoroughly convinced that Tuite's persistent failure or inability to take responsibility for his crimes and other misbehavior, consistently viewing himself as a victim, and his lack of progress in treatment and lack of amenability to further treatment, together with the seriousness of the offenses for which he was convicted, would have led the court to deny Tuite's Rule 35 motion regardless of the court's allegedly incorrect findings. Therefore, Tuite's request that we vacate the order and remand for a new hearing due to the alleged factual errors will be denied.

Tuite also argues that on the record presented the district court abused its discretion by declining to reduce Tuite's sentence on the Rule 35 motion. In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 159 P.3d 838 (2007). Our focus on review is upon the nature of the offense and the character of the offender. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). Where a sentence is not illegal, the appellant must show that it is unreasonably harsh in light of the primary objective of protecting society and the related goals of deterrence, rehabilitation and retribution. *State v. Broadhead*, 120 Idaho 141, 145, 814 P.2d 401, 405

(1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

Having reviewed the record, including the new information submitted with Tuite's Rule 35 motion, we find no abuse of discretion in the district court's denial of the motion. Accordingly, the district court's order denying Tuite's I.C.R. 35 motion is affirmed.